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No. 98-1628

In The

Supreme Court of the United States

SALT RIVER PROJECT AGRICULTURAL IMPROVEMENT AND POWER DISTRICT,

Petitioner,

vs.

HAROLD DAWAVENDEWA,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circut

BRIEF IN OPPOSITION

BRADLEY H. SCHLEIER
Counsel of Record
TOD F. SCHLEIER
SCHLEIER, JELLISION & SCHLEIER, P.C.
3101 North Central Avenue
Suite 800
Phoenix, Arizona 85012
(602) 277-0157
Attorneys for Respondent

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

37BP

QUESTION PRESENTED

Whether a private employer's policy to give job preferences to prospective employees on the basis of membership in a particular Native American tribe violates the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*?

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RESPONSE TO PETITION FOR WRIT OF CERTIORARI

Harold Dawavendewa ("Dawavendewa") respectfully requests that the Court deny the petition by Salt River Project Agricultural Improvement and Power District ("Salt River Project") for a writ of certiorari.

REASONS FOR DENYING THE PETITION

I. No Compelling Reason Exists For The Granting Of The Writ.

Supreme Court Rule 10 sets forth the limited circumstances in which this Court will exercise its discretionary powers in granting a petition for a writ of certiorari. As this case does not involve a conflict in the various circuit courts of appeals or a state court of last resort, Salt River Project must rely on the criterion set forth in Rule 10(c) to convince this Court to expend its time and resources on a very narrow issue of first impression. Specifically, Salt River Project must show that Dawavendewa's claim involves an "important question of federal law, that has not been, but should be settled by this Court." *See* Supreme Court Rule 10(c).

However, as demonstrated below, this Court should not grant the writ of certiorari in the present case for the following reasons:

1. The decision of the Ninth Circuit was a correct interpretation of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.* [hereinafter "Title VII"] based, in a large part, on Justice Thomas' 1988 Policy Statement issued

when he was Chairman of the Equal Employment Opportunity Commission [hereinafter "EEOC"];

2. This is an issue of first impression decided by the Ninth Circuit which no other Circuit addressed;

3. There is no conflict between the Ninth Circuit's decision and the Indian Self Determination Act, 25 U.S.C. § 450 *et seq.* ["ISDA"] (in fact, the Ninth Circuit's decision completely conforms to the ISDA);

4. The only potential conflict between Title VII and the ISDA is merely theoretical and does not involve the facts of the present action;

5. The issues presented are "personal" to the parties and not sufficiently important to warrant this Court's intervention in light of the fact that no other decisions on this issue have been issued in the 35 years that Title VII has been law; and

6. The Ninth Circuit's conclusion that discrimination on the basis of tribal affiliation violates Title VII's protections against "national origin" discrimination does not conflict with this Court's decision in *Morton v. Mancari*, 417 U.S. 535, 94 S.Ct. 2474, 41 L.Ed. 290 (1974).

Because there is no compelling reason for this Court to exercise its jurisdiction, Salt River Project's petition for writ of certiorari should be denied.

II. The Ninth Circuit Correctly Applied Title VII Law To The Present Case.

Without arguing the merits of the issue decided by the Ninth Circuit, the Ninth Circuit's well-reasoned decision was clearly the correct and appropriate decision. Specifically, the Ninth Circuit's decision took into account

the underlying purpose of Title VII to protect individuals from discrimination, the affect and applicability of other laws dealing with the powers of Native American tribal nations, and the applicability of the EEOC's Policy Statement issued by then Chairman, now Justice, Clarence Thomas addressing the exact situation presented in this case.

One of the most significant considerations of the Ninth Circuit was the fact that the EEOC had directly addressed the issue presented in the case *sub judice.* Under Justice Thomas the EEOC issued a policy statement that directly supported Dawavendewa and the Ninth Circuit's reasoning. Specifically, in May 1988, the EEOC issued a policy statement that directly addressed the issue of whether discrimination based on tribal affiliation violated Title VII. On behalf of the Commission, Justice Thomas concluded:

> On this point, the Commission believes that, in enacting Section 703(i), Congress intended to encourage the extension of employment opportunities to Indians generally, without allowing discrimination among Indians of different tribes. Under Section 703(i), the exception applies to employment practices under which preferential treatment is given to "*any* individual because he is an Indian living on or near a reservation" (emphasis added). The statutory language supports the conclusion that Congress did not intend to permit tribal distinctions among Indians otherwise qualifying for such preferential treatment.
>
> Further, as a practical matter, the Commission notes that in some instances employers may be

> located on or near the reservation of only one tribe and that the Indians living on or near that reservation may be members of that tribe. Under such circumstances, the preferences may operate, in effect to favor only members of that specific tribe without disadvantaging Indians of other tribes. However, in some parts of the country employers are situated near the reservation of more than one tribe or more than one tribe may share the same reservation. The potential inequities resulting from according a preference based on tribal affiliations are most clearly evident when these circumstances are contemplated.
>
> In light of these considerations, it is the Commission's position that extension of an employment preference on the basis of tribal affiliation is in conflict with and violates Section 703(i) of Title VII. The Commission emphasizes, however, that its position with respect to Section 703(i) affects only employers covered by Title VII. Since Indian tribes are exempt from the provisions of Title VII under Section 701(b)(1), preferences or requirements based on tribal membership or affiliation imposed by a tribe with respect to its own employment practices are not violative of Title VII. *See Wardle v. Ute Indian Tribe*, 623 F.2d 670, 23 EPD ¶ 31,035 (10th Cir. 1980).

See Policy Statement on Indian Preference Under Title VII, Appendix 18-19.

The Ninth Circuit saw the wisdom of Justice Thomas' reasoning from a decade earlier and found no support of

a claim that the sound legal basis supporting his conclusion had changed in the decade following the issuance of the EEOC's Policy Statement.[1]

As the Ninth Circuit gave full consideration to all of the issues presented and decided them correctly, there is no compelling reason for this court to exercise its jurisdiction and grant the writ of certiorari.

III. The Ninth Circuit's Decision Stands Alone On This Issue And This Court's Involvement Is Therefore Not Warranted.

In reviewing the Ninth Circuit's decision, one thing is readily apparent. The present action was a case of first impression on this issue in the United States. To date, no other district court or circuit court of appeals has had the opportunity to address this issue. Because no dispute exists between the Ninth Circuit and any other court in the nation, the present case is not ripe for this Court to expend its limited time and resources. Consequently, Salt River Project's petition should be denied.

IV. No Dispute Exists Between The Ninth Circuit's Interpretation Of Title VII And The ISDA.

In requesting that this Court grant the writ of certiorari, Salt River Project argues that the Ninth Circuit's

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[1] Salt River Project contends that some of the regulations relied upon by the EEOC have either changed or been modified since the EEOC pronouncement. However, as demonstrated *infra*, the same considerations and reasoning utilized by Justice Thomas are still viable today.

decision creates a fundamental conflict between Title VII and recent amendments to the ISDA. However, as noted in the Ninth Circuit's decision, the ISDA serves a different purpose than Title VII and, furthermore, the recent amendments to the ISDA **support** the position taken by Dawavendewa and the EEOC. *See Dawavendewa v. Salt River Project Imp. And Power Dist.*, 154 F.3d 1117, 1123 (9th Cir. 1998) (P.App.[2] 15a). Moreover, recent amendments to the ISDA, other similar regulations, and the Ninth Circuit's decision collectively show a statutory scheme that provides appropriate protections of tribal sovereignty, yet does not permit private employers to engage in discrimination based on tribal affiliation.

Initially, as correctly noted by the Ninth Circuit, the purpose of the ISDA is completely different from Title VII. While the purpose of the ISDA is to shift control of certain federal programs to the tribal entities, Title VII provides relief to individual employees for discrimination. *See Dawavendewa, supra* at 1123 (P.App. 15a); 25 U.S.C. § 450 *et seq.; FGS Constructors, Inc. v. Carlow*, 64 F.3d 1230 (8th Cir. 1995), *cert. denied*, 517 U.S. 1134 (1996) (holding that ISDA provisions dealing with self-determination contracts **only** apply to contracts between tribes and federal government, and not a private party retained to work on projects funded by self-determination contracts). One of the primary purposes of the ISDA is to assist the various Native American tribal nations, while permitting them some sovereignty with regard to the

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[2] "P.App" refers to Petitioner's Appendix.

administration of federal programs.[3] *See* 25 U.S.C. § 450(a)(b); *State of Alaska ex rel. Yukon Flats Sch. Dist. v. Native Village of Venetie Tribal Gov't*, 101 F.3d 1286, 1299 (9th Cir. 1996), *rev'd on other grounds, Alaska v. Native Village of Venetie Tribal Gov't*, ___ U.S. ___, 118 S.Ct. 948, 140 L.Ed.2d 30 (1998). Moreover, the employment provisions of the ISDA mirror the provisions of Title VII, the Ninth Circuit's decision, and the EEOC Policy Statement by permitting a general preference in the hiring of Native Americans and **only** permitting preferences on the basis of tribal affiliation when tribes are acting in a "quasi-governmental" function.

Specifically, 25 U.S.C. § 450e(b) of the ISDA provides that any contracts, subcontracts, or grants to Indian organizations for the benefit of Native Americans shall require that a preference for employment be given to Native Americans. In 1994, the ISDA was amended, however, and the amendment provides a very narrow situation where a **single** tribal nation receives and administers a "self-determination" contract from the federal government.[4] The newly added Section 450e(c) of the ISDA states:

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[3] The purpose of the legislation did not change with the 1994 amendment. Even though some portions of 25 U.S.C. § 450a were redrafted, the overriding purpose of the legislation did not change.

[4] "Self-determination" contracts involve situations where the federal government secedes control of certain federal government programs directly to the tribal nations for administration. *See* 25 U.S.C. § 450f.

> Notwithstanding subsections (a) and (b) of this section, **with respect to any self-determination contract, or portion of a self-determination contract**, preference laws adopted by such tribe shall govern with respect to the administration of the contract or portion of the contract. (emphasis added)

The amendment set forth the very limited circumstances in which a tribal nation can provide a preference to its own tribal members. As correctly recognized by the Ninth Circuit, tribal preferences under the ISDA are, therefore, only appropriate in the very limited situations in which a tribe is acting in a governmental capacity and administering a "self determination contract."[5] This interpretation is also in accord with Title VII's exemption of tribal nation governments from coverage under the statute. *See* 42 U.S.C. § 2000e-(b)(1).

Moreover, the Ninth Circuit's interpretation of Title VII and the ISDA will also avoid creating a direct conflict between Title VII, the ISDA, and other federal regulations which permit preferences to be given to Indians, generally, but do not permit preferences on the basis of tribal affiliation. *See* 23 C.F.R. § 635.117(d) (1998) (permits state highway agencies to provide preference to Native Americans living on or near a reservation, but such a preference should not take into account tribal affiliation); 48 C.F.R.

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[5] Obviously, if Congress believed that preferences based on tribal affiliation were appropriate for all governmental contracts under the ISDA, it could have amended the statute to include such language and not limit itself to the narrow circumstances involving "self determination contracts" as set forth in 25 U.S.C. § 450e(c).

§ 22.807(b)(4) (1998) (permits federal contractors to give preference to the employment of Indians living on or near reservation but employers may not discriminate among Indians on the basis of tribal affiliation); 25 C.F.R. § 256.3(b) (1998) (provides housing assistance to every Indian "regardless of tribal affiliation"); 48 C.F.R. § 352.270-2(a) (1998) (permits contractors with the Department of Health and Human Services permitted to provide preferences to Indians, but not on the basis of "tribal affiliations"); 48 C.F.R. § 1452.226-70(a) (1998) (permits contractors with the Department of Interior can provide preferences to Indians, but not on basis of tribal affiliation).

In further conformance with this interpretation are the regulations dealing with the Native American Housing Assistance and Self Determination Act of 1996 that permit Indian Tribes to grant tribal preferences in administering grants provided for a tribe's benefit. 62 Fed. Reg. 35718, 35739 (July 2, 1997). This regulation is consistent with the ability of a tribe to enforce tribal preference ordinances in the administration of self-determination contracts as set forth in § 450e(c) of the ISDA; both situations involve tribal governments acting in a quasi-governmental fashion relative to the administration of governmental programs.

Therefore, the Ninth Circuit's interpretation did not create a conflict between Title VII and the ISDA, but continued the already uniform interpretation of laws which permit preferences to Indians in general, and only permit tribal affiliation preferences in the very narrow circumstances in which tribes are acting in a quasi-governmental fashion. This distinction helps promote the

employment of Indians in general, yet also permits tribal nations to maintain their sovereignty in making employment decisions relating to governmental functions unfettered by statutory limitations.

V. Any Conflict Between The ISDA And Title VII Is Merely Theoretical.

Salt River Project argues that the Ninth Circuit recognized that there was a conflict between its interpretation of Title VII and the language of the ISDA. Specifically, Salt River Project refers to a footnote where the Ninth Circuit, in *dicta*, noted that a conflict "may" arise between the provisions; however, the Ninth Circuit did not address this theoretical conflict as it did not involve the case *sub judice*. *See Dawavendewa, supra* at 1124 n. 14; Petitioner's App. 17a.

Although a theoretical conflict may exist, it is not the basis for this Court taking an extraordinary step and exercising its jurisdiction. As this Court noted in *Rice v. Sioux City Memorial Park Cemetery*, 349 U.S. 70, 74, 75 S.Ct. 614, 616 (1955)[6], this Court does not accept jurisdiction to satiate some intellectual curiosity. Specifically, this Court noted:

> A federal question raised by a petitioner may be 'of substance' in the sense that,

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[6] Though *Rice, supra* was decided prior to the effective date of Supreme Court Rule 10, the standards applicable to this Court's discretionary review were less "exacting" than today's need for a "compelling" reason and, therefore, are equally appropriate for the Court's consideration of the present petition.

> abstractly considered, it may present an intellectually interesting and solid problem. But this Court does not sit to satisfy a scholarly interest in such issues. Nor does it sit for the benefit of particular litigants. (cites omitted) 'Special and important reasons' imply a reach to a problem beyond the academic or episodic.

The theoretical conflict that may exist between the ISDA and Title VII should not be the basis for granting the Salt River Project's petition, as the theoretical problem cited by the Ninth Circuit was merely *dicta* and did not involve the factual record before the Court. Consequently, Salt River Project's request that this Court grant certiorari should be denied.

VI. The Issues In The Present Action Are Not Sufficiently Important For This Court To Exercise Its Jurisdiction.

As Title VII celebrates its 35th anniversary, the present action, though interesting from an intellectual point of view, is quite unique and limited in scope. Moreover, even though the EEOC issued a policy statement on this exact issue over a decade ago, the present case is the first of its kind and there are no other reported cases on this issue.

In light of the 35 years that have passed since the passage of Title VII, the current situation can be seen as nothing more than an academic exercise involving a

singular episode.[7] This dispute can be seen as nothing more than "personal" to the parties to this action. In light of the teaching in *Rice, supra,* Salt River Project, therefore, cannot demonstrate that the present issue is sufficiently important for this Court to invest its limited time and resources. Consequently, Salt River Project's petition should be denied.

VII. There Is No Inherent Conflict Between The Ninth Circuit's Opinion And This Court's Opinion In *Morton v. Mancari.*

In its petition, Salt River Project devotes a significant portion of its brief attempting to demonstrate that there is a conflict between the Ninth Circuit's interpretation of the parameters of Title VII (in holding that discrimination based on tribal affiliation is discrimination based on national origin discrimination) and this Court's decision in *Morton v. Mancari,* 417 U.S. 535, 94 S.Ct. 2474, 41 L.Ed.2d 290 (1974). However, as recognized by the Ninth Circuit, there is no conflict between its decision and the *Morton* decision.

Specifically, the Ninth Circuit properly concluded that the issues presented differed significantly from *Morton, supra* and that the goals being promoted in that case differ significantly from the present case. The Ninth Circuit noted that *Morton* did not involve a claim involving a violation of Title VII, nor did the case involve a claim of

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[7] On a further note, a review of the locations of the various tribal nations demonstrates that there are only a few circumstances in which differing tribal nations share borders.

tribal affiliation discrimination. Unlike the present action, *Morton* was limited to circumstances in which the Bureau of Indian Affairs (BIA) provided preferences to Native Americans, generally, and specifically in hiring and promotion decisions. In light of the purpose of the BIA and its role in working with tribal governments on the administration of governmental programs relating to the tribes, this Court believed a general preference to Indians was appropriate to promote tribal self-governance. *Morton, supra* at 535-36. However, *Morton, supra* did not address or discuss discrimination by a private employer between members of separate tribal nations.

Salt River Project tries to expand the holding of *Morton* to apply to the present action by stating that the Ninth Circuit's ruling somehow impacts on tribal sovereignty. However, the Court has noted that tribal sovereignty is not absolute. Absent express authorization by federal statute or treaty, tribal jurisdiction over the conduct of nonmembers exists only in very limited circumstances. *See Strate v. A-1 Contractors*, 520 U.S. 438, 117 S.Ct. 1404, 1409 (1997); *Montana v. United States*, 450 U.S. 544, 101 S.Ct. 1245 (1981). Generally, tribes lack the "right of self governing every person within their limits except themselves." *See Montana, supra* citing *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 209, 98 S.Ct. 1011, 1021 (1978). The inherent sovereign powers of a Native American tribe do not extend to the activities of non-members of the tribe. *Id.* at 565, 101 S.Ct. at 1258. As noted by *Montana*, tribal power is very limited:

> In addition to the power to punish tribal offenders, Indian tribes retain their inherent

> power to determine tribal membership, to regulate domestic relations among members, and to prescribe rules of inheritance for members. But exercise of tribal power beyond what is necessary to protect tribal self-government or to control internal relations is inconsistent with the dependent status of the tribes and so cannot survive without express congressional delegation.

Id. at 564, 101 S.Ct. 1257-58 (citation omitted). This Court, therefore, has recognized that tribal sovereignty is not as broad as Salt River Project argues.

Consequently, because there is no conflict between the Ninth Circuit's decision and this Court's decision in *Morton, supra,* this Court should not exercise its jurisdiction and grant Salt River Project's petition.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted,

BRADLEY H. SCHLEIER
Counsel of Record
TOD F. SCHLEIER
SCHLEIER, JELLISION & SCHLEIER, P.C.
3101 North Central Avenue
Suite 800
Phoenix, Arizona 85012
(602) 277-0157
Attorneys for Respondent

EEOC: Policy Statement on Indian Preference Under Title VII

EEOC POLICY STATEMENT

Subject Matter

Section 703(i) of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e-2(i) (1982), provides an exception to Title VII's general nondiscrimination principles allowing certain employers under certain circumstances to exercise an employment preference in favor of American Indians.[1] That section provides as follows:

> Nothing contained in this title shall apply to any business or enterprise on or near an Indian reservation with respect to any publicly announced employment practice of such business or enterprise under which a preferential treatment is given to any individual because he is an Indian living on or near a reservation.

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[1] This policy statement does not extend to charges/complaints brought under either the Age Discrimination in Employment Act of 1967, as amended (ADEA), 29 U.S.C. § 621 *et seq.* (1982), or the Equal Pay Act of 1963 (EPA), 29 U.S.C. § 206(d) (1982), since, unlike Title VII, neither of those statutes contains an Indian preference exception. Additionally, neither the ADEA nor the EPA provides a jurisdictional exemption for Indian tribes as does Section 701(b)(1) of Title VII.

The statutory language makes it clear that an employer seeking to avail itself of the Indian preference exception must meet three conditions: (1) the employer must be located on or near an Indian reservation, (2) the employer's preference for Indians must be publicly announced, and (3) the individual to whom preferential treatment is accorded must be an Indian living on or near a reservation. Neither Section 703(i) nor any other section of the Act, however, defines the terms "Indian reservation" or "near."

Although the Commission has issued several decisions involving the jurisdictional exemption of Indian tribes under Section 701(b)(1) of Title VII,[2] its one published decision involving the Indian preference exception under Section 703(i) of the Act turned solely on the question of whether the employer had satisfied the public announcement requirement of that section. *See* Commission Decision No. 74-26, CCH EEOC Decisions (1983) ¶6398. Thus, the Commission did not have occasion in that case to address the statutory requirement of being "on or near an Indian reservation."

Because the Commission has received various requests from employers, Indian tribes, and state fair employment practices agencies for its interpretation of the "on or near" phrase and the applicability of the Indian preference exception and because the issue is an increasingly important one on which the Commission has not previously issued guidance, the Commission now

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[2] *See* Commission Decision No. 80-14, CCH EEOC Decisions (1983) ¶6823, and Commission Decision Nos. 85-6 and 85-7, CCH Empl. Prac. Guide ¶¶6847 and 6848, respectively.

delineates its position with respect to the exception provided in Section 703(i) of the Act. Specifically, the Commission addresses: (1) the definition of "Indian reservation" for Title VII purposes, (2) the meaning of the term "near," (3) the scope of the term "employment practice," and (4) the issue of whether a preference based on tribal affiliation conflicts with the provisions of Title VII.

Indian Reservation

The need to define the term "Indian reservation" within the meaning of Section 703(i) of Title VII arises in connection with the circumstances that exist in the state of Oklahoma. As has been brought to the Commission's attention, Oklahoma is the home of a large number of Indian tribes and many areas of the state contain high Native American populations, yet there are no longer any Indian reservations as such in Oklahoma.[3] Many employers in the state, however, are located in and around the sites of former reservations. Thus, the question presented is whether the Indian preference exception provided in Section 703(i) is available to such employers or whether applicability of that provision is dependent upon the present existence of an Indian reservation as the necessary base from which to measure whether the "on or near" requirement is met.

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[3] Prior to statehood in 1907, the area comprising present-day Oklahoma was Indian Territory. For a detailed discussion of the history of the land, see F. Cohen, *Handbook of Federal Indian Law* 770-75 (1982 ed.). *See also* S. Pevar, *The Rights of Indians and Tribes* 231-33 (Bantam ed. 1983).

The issue is one of first impression. As noted above, Title VII does not define the term "Indian reservation." Nor is there any indication in the legislative history of the Act of the meaning intended by Congress in its use of that term is section 703(i). Further, research has disclosed no court decision defining the term for Title VII purposes.

Before examining statutory use of the term outside the context of Title VII, we consider its ordinary meaning:

> The term "Indian reservation" originally had meant any land reserved from an Indian cession to the federal government regardless of the form of tenure. During the 1850's, the modern meaning of Indian reservation emerged, referring to land set aside under federal protection for the residence of Tribal Indians, regardless of origin.[4]

Although "Indian reservation" is the more commonly familiar term, the governing legal term for most jurisdictional purposes is "Indian country."[5]

Id. at 27.

The latter is defined at 18 U.S.C. § 1151 as follows:

> Except as otherwise provided in sections 1154 and 1156 of this title, the term "Indian country," as used in this chapter, means (a) all land within the limits of any Indian reservation under the jurisdiction of the United States government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation, (b) all dependent Indian communities within the borders of the United States

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[4] Cohen, *supra* note 3, at 34.

[5] *Id.* at 27.

> whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same.

The definition in Section 1151 is controlling with respect to the applicability of federal criminal law in Indian country. While this definition relates specifically to determinations of federal criminal jurisdiction, the Supreme Court has noted that it is also applicable to questions of federal civil jurisdiction.[6] However, although Indian reservations are included in the statutory definition of Indian country, the term "Indian reservation" is not separately defined.[7]

Similarly, the terms "Indian reservation" or "reservation" appear but are undefined in numerous other federal statutes.[8] A review of Title 25 of the U.S. Code, which

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[6] *DeCocteau v. District County Court*, 420 U.S. 425 (1975). "While § 1151 is concerned, on its face, only with criminal jurisdiction, the Court has recognized that it generally applies as well to questions of civil jurisdiction." *Id.* at 427 n.2 (citations omitted).

[7] In determining whether a particular tract of land constitutes a reservation within the meaning of § 1151(a), courts have examined the history of the land in light of acts of Congress, rulings by the Department of the Interior, and prior judicial decisions bearing on its status. *See, e.g., United States v. John*, 437 U.S. 634 (1978); *Cheyenne-Arapaho Tribes v. State of Oklahoma*, 618 F.2d 665 (1980); and *Langley v. Ryder*, 602 F. Supp. 335 (W.D. La. 1985).

[8] *See, e.g.*, 16 U.S.C. §§ 796(2), 797(e); 25 U.S.C. §§ 33, 46, 155, 175, 176, 196, 200, 211, 231-233, 253, 262, 264, 279, 280, 283,

pertains specifically to Indians, has disclosed only three instances in which "reservation" is defined, although the term is used repeatedly throughout that title.[9] Of these three definitions, one relates specifically to an Indian tribe in Connecticut.[10] A second definition, which is of general application, is found in the Indian Child Welfare Act of 1978, 25 U.S.C. § 1901 *et seq.* Incorporating and expanding upon the definition of Indian country, that Act provides as follows:

> "[R]eservation" means Indian country as defined in section 1151 of title 18 and any lands, not covered under such section, title to which is either held by the United States in trust for the benefit of any Indian tribe or individual or held by any Indian tribe or individual subject to a restriction by the United States against alienation.

25 U.S.C. § 1903(10).

The third definition appears in the Indian Financing Act of 1974, 25 U.S.C. § 1451 *et seq.*, which provides Indian tribes and individuals capital in the form of loans and grants to promote economic development. That definition specifically includes former Indian reservations in Oklahoma. As defined therein:

286, 291, 292, 304, 307, 309, 311, 312, 318a-321, 331, 333, 334, 336, 337, 339, 340, 342, 344, 348, 350-352, 380, 381, 393, 396a, 397-399, 400a, 402a, 407, 415, 461, 463, 463e, 465, 467, 468, 476-479, 488, 501, 631, 1083, 1311, 1466, 1495, 1521; 43 U.S.C. §§ 149, 150, 851, 856, 868, 1195-1196.

[9] *See* citations to 25 U.S.C. *supra* note 8.

[10] *See* 25 U.S.C. § 1752 (Supp. III 1985).

> "Reservation" includes Indian reservations, public domain Indian allotments, former Indian reservations in Oklahoma, and land held by incorporated Native groups, regional corporations, and village corporations under the provisions of the Alaska Native Claims Settlement Act [43 U.S.C. 1601 et seq.].

25 U.S.C. § 1452(d).

While no statutory definition discovered other than that in the Indian Financing Act explicitly recognizes former Indian reservations in Oklahoma, they are included in the definition of "reservation" contained in various regulations promulgated by the Bureau of Indian Affairs (BIA) of the Department of the Interior. For example, in the regulations governing BIA's financial assistance and social services program, 25 C.F.R. § 20.1 *et seq.* (1987), the following definition is provided:

> "Reservation" means any federally recognized Indian tribe's reservation, Pueblo, or Colony, including former reservations in Oklahoma, Alaska Native regions established pursuant to the Alaska Native Claims Settlement Act (85 Stat. 688), and Indian allotments.

25 C.F.R. § 20.1(v) (1987).[11]

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[11] The cited regulations were issued under 25 U.S.C. § 13, which authorizes BIA to expend money appropriated by Congress for the benefit, care, and assistance of Indians. For other instances in which BIA regulations define "reservation" as including former Indian reservations in Oklahoma, see 25 C.F.R. §§ 101.1(k) (loans to Indians from revolving loan fund), 103.1(h) (loan guaranty, insurance, and interest subsidy), 151.2(f) (land acquisitions), 273.2(o) (education contracts under Johnson

Against this background, the Commission must determine the meaning of the term "Indian reservation" under section 703(i) of Title VII. In so doing, the commission is mindful that Title VII is remedial social legislation and is, therefore, entitled to liberal construction in order to effectuate the purpose of the Act.[12] The purpose for the inclusion of Section 703(i) is explained in the legislative history:

> A new subsection 703(i) has been added permitting enterprises on or near Indian reservations to follow preferential hiring practices toward Indians. This exemption is consistent with the Federal government's policy of encouraging

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O'Malley act), and 286.1(j) (Indian business development program).

A similar definition is provided in regulations of the Department of the Interior (implementing Section 7(b) of the Indian Self-Determination and Education Assistance Act, 25 U.S.C. § 450e(b)), at 48 C.F.R. § 1404.7001 (1987). That section provides:

> "Indian reservation" includes Indian reservations, public domain Indian allotments, former Indian reservations in Oklahoma, and land held by incorporated Native groups, regional corporations, and village corporations under the provisions of the Alaska Native Claims Settlement Act (85 Stat. 688; 43 U.S.C. 1601 et seq.).

[12] *See EEOC v. First Catholic Slovak Ladies Association*, 694 F.2d 1068, 1070, 30 EPD ¶ 33,175 [30 FEP Cases 819] (6th Cir.), *cert. denied*, 464 U.S. 819, 32 EPD ¶ 33,829 [32 FEP Cases 1672] (1983); and *Zimmerman v. North American Signal Company*, 704 F.2d 347, 352, 31 EPD ¶ 33,486 [31 FEP Cases 634] (7th Cir. 1983).

Indian employment and with the special legal position of Indians.[13]

In the Commission's view, the Congressional purpose of encouraging the voluntary extension of employment opportunities to Indians would be unduly hampered by narrowly defining the term "Indian reservations" within the meaning of Section 703(i) to exclude former Indian reservations in Oklahoma. Such a definition would effectively preclude the applicability of Title VII's Indian preference provision to employers in a state which was originally Indian Territory and whose present population includes a high percentage of Native Americans, a result which appears contrary to the intent of section 703(i). Additionally, the Commission takes note that a narrow definition of that term would similarly render the preference inapplicable in the state of Alaska.[14]

In light of these considerations, the Commission believes that the purpose of section 703(i) would be furthered by defining "Indian reservation" in a manner that accords special recognition to the circumstances that exist in both Oklahoma and Alaska. Therefore, guided by the definitions of "reservation" provided in the Indian Financing Act of 1974 and in regulations issued by the Bureau of Indian Affairs,[15] it is the Commission's position that the terms "Indian reservation" and "reservation" in

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[13] 110 Cong. Rec. 12723 (1964) (statement of Senator Humphrey).

[14] For a discussion of native land rights in Alaska, see Cohen, *supra* note 3, at 739-48.

[15] *See supra* note 11.

section 703(i) of Title VII include former Indian reservations in Oklahoma and land held by incorporated Native groups, regional corporations, and village corporations in Alaska under the provisions of the Alaska Native Claims Settlement Act.

Should a dispute arise regarding whether a particular tract of land falls within this definition, the Commission will present the question to the Bureau of Indian Affairs and will make its determination after consideration of the conclusion reached by that agency.

On or Near an Indian Reservation

Section 703(i) of Title VII uses the phrase "on or near an Indian reservation" in identifying the businesses or enterprises that may lawfully exercise the Indian preference exception provided in that section. The individual Indians to whom preferential treatment may be extended are similarly identified as those living "on or near a reservation." With respect to this phrase, the issue presented in determining whether the statutory criterion is met regards the meaning of the word "near," which is undefined in the Act.

The sole Title VII case deciding the applicability of the Indian preference contained in Section 703(i) is *Livingston v. Ewing*, 601 F.2d 1110, 20 EPD ¶30,002 (10th Cir.), *cert. denied*, 444 U.S. 870, 20 EPD ¶30,266 (1979). In that case, the non-Indian plaintiffs challenged the policy of the Museum of New Mexico in Santa Fe of permitting only Indians to sell their handmade jewelry and crafts on the grounds of the Museum. Holding that the Museum's policy came within the Section 703(i) exception, even

though the Museum was not the direct employer of the Indians, the court found that the "on or near" requirement was satisfied by facts showing that the Museum was located eight miles from an Indian reservation and within a "short distance" of other reservations, including the ones from which the Indians came. 601 F.2d at 1115.

However, because the court's holding in *Livingston v. Ewing* is fact-specific, the decision in that case does not provide a definition of the word "near" for Title VII purposes. Nor is general guidance on the meaning of that term found outside of Title VII in the Supreme Court's decision in *Morton v. Ruiz*, 415 U.S. 199 (1974). Although the Court there held that, in appropriating funds for the Bureau of Indian Affairs' general assistance program, Congress did not intend to limit eligibility for benefits under the program to Indians living "on" a reservation, to the exclusion of those living "near" one, the Court did not decide the breadth of the term "near." Rather, the Court held that it covered the Indian plaintiffs, who lived in an Indian community fifteen miles from their reservation.

Although applicable judicial precedent defining "near" is lacking, a definition of that term is found in regulations issued by the Office of Federal Contract Compliance Programs (OFCCP) of the Department of Labor. 41 C.F.R. §60-1.1 *et seq.* (1987). The regulations, which apply to federal contractors, define "near" with reference to an Indian preference provision similar to that contained in Section 703(i) of Title VII. The regulations provide in pertinent part:

> *Work on or near Indian reservations.* It shall not be a violation of the equal opportunity clause for a construction or nonconstruction contractor to extend a publicly announced preference in employment to Indians living on or near an Indian reservation in connection with employment opportunities on or near an Indian reservation. *The use of the word "near" would include all that area where a person seeking employment could reasonably be expected to commute to and from in the course of a work day.*

41 C.F.R. §60-1.5(a)(6) (1987) (emphasis added.)[16]

Upon considering the intent of Section 703(i), the Commission is persuaded that the definition of "near" in the OFCCP regulations cited above is consistent with and furthers the purpose of the Title VII provision. As noted, this definition appears in the specific context of an Indian preference provision that parallels that in Title VII. Unlike a definition that establishes the outer reach of that term by specifying a fixed distance applicable in all cases, a definition based on what may be considered reasonable commuting distance provides the flexibility necessary to take differing geographic and economic circumstances

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[16] The Commission notes that the term "near" is similarly defined in Department of the Interior regulations implementing the Indian preference provision of the Indian Self-Determination and Education Assistance Act, 25 U.S.C. §450e(b). At 48 C.F.R. §1404.7001 (1987), these regulations provide:

> "On or near an Indian reservation" means on a reservation or the distance within that area surrounding an Indian reservation(s) that a person seeking employment could reasonably be expected to commute to and from in the course of a work day.

into account. Thus, since proximity to employment sources varies from one reservation to another and one part of the country to another, such a definition avoids potential inequities and promotes a fair application of the statutory exception.

For these reasons, the Commission adopts the definition of "near" provided in the OFCCP regulations set forth above as the definition of that term under Section 703(i) of Title VII. Applying this definition, determinations of whether the "on or near" criterion is met shall be made on a case-by-case basis.

Employment Practice

To what extent may preferential treatment be accorded Indians under Section 703(i)? That section provides an Indian preference exception with respect to "any publicly announced employment practice." The legislative history, discussed above, indicates that this exception permits covered employers to follow preferential *hiring* practices toward Indians.[17] The question before the Commission is whether the term "employment practice" in Section 703(i) thus refers solely to initial hiring decisions.

In *Morton v. Mancari*, 417 U.S. 535, 7 EPD ¶9431 [8 FEP Cases 105] (1974), the Supreme Court upheld an employment preference for Indians in the Bureau of Indian Affairs (BIA) under Section 12 of the Indian Reorganization Act of 1934, 25 U.S.C. §472. The Court held that the preference provided in the 1934 Act was not

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[17] *See supra* note 13 and accompanying text.

repealed by implication by the 1972 amendments to Title VII, which extended Title VII's discrimination prohibitions to federal sector employment. The Court further held that the preference did not constitute invidious racial discrimination in violation of the Due Process Clause of the Fifth Amendment. The statute at issue in *Mancari* provides a preference with respect to "appointment to vacancies." Although the preference previously had been accorded only at the initial hiring stage, under BIA policy as revised in 1972 it was extended to filling vacancies by original appointment, reinstatement, and promotions. 417 U.S. at 538 n.3. Because the question of whether the 1934 Act authorized a preference in other than initial hiring was not before the Court in *Mancari*, the Court noted that it expressed no opinion on that issue. *Id.* at 539 n.5. However, the Court cited two lower court decisions in which the phrase "appointment to vacancies" in Section 12 of the 1934 Act was specifically construed, *Freeman v. Morton* and *Mescalero Apache Tribe v. Hickel*.

In *Freeman v. Morton*, 499 F.2d 494 (D.C. Cir. 1974), the court held that the BIA preference applies to filling vacancies through initial hiring, promotion, lateral transfer, and reassignment. In *Mescalero Apache Tribe v. Hickel*, 432 F.2d 956 (10th Cir. 1970), *cert. denied*, 401 U.S. 981 (1971), the court concluded that the preference was not applicable to reductions in force since such circumstances do not involve the filling of vacancies. Based on the statutory language and the legislative history, the court in *Mescalero* found that Congress did not intend the preference to be applied in a manner that would result in the displacement of existing non-Indian employees of BIA.

Following the Tenth Circuit's decision in *Mescalero*, however, Congress enacted legislation making the preference applicable to reductions in force at BIA and the Indian Health Service. *See* 25 U.S.C. §472a(a) (1982). "The purpose of this provision is to overcome the adverse effects of the *Mescalero decision. . . . " H.R. Rep. No. 370, 96th Cong., 1st Sess. 12, reprinted in* 1979 U.S. Code Cong. & Ad. News 2068, 2077. *See Preston v. Heckler,* 734 F.2d 1359, 1371 n.15 (1984) (commenting on the Congressional response to *Mescalero* in a case involving application of the preference in the Indian Health Service).

In the Commission's view, Congress's use of the general term "employment practice" in section 703(i) of Title VII suggests an intent to permit preferential treatment of Indians more broadly than in the context of hiring alone. Although the court cases discussed above analyze the scope of an Indian preference authorized under a statute other than Title VII, the Commission believes that these decisions and the subsequent Congressional enactment in response to *Mescalero* provides useful guidance in determining the breadth of the term "employment practice" in Section 703(i).

Drawing upon this guidance, it is the Commission's position that, for Title VII purposes, employment practices under which preferential treatment may be accorded to Indians are those requiring the selection of individuals to fill positions, however created, or to retain positions when jobs are eliminated. Accordingly, the preference is applicable to employment decisions involving, for example, hiring, promotion, transfer, and reinstatement as well as to layoffs and reductions in force.

The Commission does not reach a determination of whether the term "employment practice" in Section 703(i) covers other terms conditions, or privileges of employment, such as compensation, benefits, work assignments, or training. The issue of whether that Indian preference in Title VII extends to employment decisions involving such terms and conditions is non-CDP. Charges raising this issue should be processed according to the instructions provided in EEOC Compliance Manual §603 for processing priority-issue charges.

Tribal Affiliation

The final issue to be addressed is whether the extension of an employment preference based on tribal affiliation - that is, a preference limited to Indians who belong to a particular tribe, to the exclusion of members of any other tribe – is permissible under section 703(i) of Title VII. The issue arises, for example, where an employer located on or near a specific Indian tribe's reservation wishes to accord a preference restricted to members of that tribe either on its own initiative or in compliance with a tribal ordinance requiring that a preference be given to members of the tribe.

The Indian preference exception provided in Section 703(i) is stated in general terms. That section neither expressly authorizes nor prohibits a distinction among Indians based on tribal membership. By contrast to Title VII, which is silent on the issue of trial affiliation, regulations promulgated by the Office of Federal Contract Compliance Programs (OFCCP) of the Department of Labor

and by the Department of the Interior specifically prohibit consideration of tribal affiliation in according the preferences permitted.

The relevant provision of the OFCCP regulations, which are applicable to federal contractors, is found at 41 C.F.R. §60-1.5(a)(6) (1987). The first two sentences of that section are set out in the foregoing discussion of the definition of the phrase "on or near an Indian reservation." The final sentence of the section provides, in pertinent part, as follows:

> Contractors or subcontractors extending such a preference shall not, however, discriminate among Indians on the basis of religion, sex, or *tribal affiliation*. . . .

41 C.F.R. §60-1.5(a)(6) (1987) (emphasis added).

Section 7(b) of the Indian Self-Determination and Education Assistance Act of 1975, 25 U.S.C. §450e(b), requires the inclusion of Indian preference provisions in certain federal contracts and grants. Regulations issued by the Department of the Interior, governing the implementation of Section 7(b) of that Act, appear at 48 C.F.R. §1404.7000 *et seq.* and §§1452.204-71 and 72 (1987). These regulations require the insertion of the following clause in specified contracts:

> The Contractor agrees to give preference to Indians who can perform the work required regardless of age (subject to existing laws and regulations), sex, religion, or *tribal affiliation* for training and employment opportunities under this contract and, to the extent feasible consistent with the efficient performance of this contract, training and employment preferences and

> opportunities shall be provided to Indians regardless of age (subject to existing laws and regulations), sex, religion, or *tribal affiliation* who are not fully qualified to perform under this contract.

48 C.F.R. §1452.204-71 (1987) (emphasis added).

Thus, under the cited regulations of both OFCCP and the Department of the Interior, covered federal contractors may not discriminate among Indians on the basis of tribal affiliation in extending an employment preference. Although Title VII is silent in this regard, the Commission considers the prohibition expressed in those regulations to best serve the purpose intended by Section 703(i).

On this point, the Commission believes that, in enacting Section 703(i), Congress intended to encourage the extension of employment opportunities to Indians generally, without allowing discrimination among Indians of different tribes. Under section 703(i), the exception applies to employment practices under which preferential treatment is given to "*any* individual because he is an Indian living on or near a reservation" (emphasis added). The statutory language supports the conclusion that Congress did not intend to permit tribal distinctions among Indians otherwise qualifying for such preferential treatment.

Further, as a practical matter, the Commission notes that in some instances employers may be located on or near the reservation of only one tribe and that the Indians living on or near that reservation may be members of that tribe. Under such circumstances, the preference may operate, in effect, to favor only members of that specific

tribe without disadvantaging Indians of other tribes. However, in some parts of the country employers are situated near the reservations of more than one tribe or more than one tribe may share the same reservation. The potential inequities resulting from according a preference based on tribal affiliation are most clearly evident when these circumstances are contemplated.

In light of these considerations, it is the Commission's position that extension of an employment preference on the basis of tribal affiliation is in conflict with and violates Section 703(i) of Title VII. The Commission emphasizes, however, that its position with respect to Section 703(i) affects only employers covered by Title VII. Since Indian tribes are exempt from the provisions of the Act under Section 701(b)(1), preferences or requirements based on tribal membership or affiliation imposed by a tribe with respect to its own employment practices are not violative of Title VII. *See Wardle v. Ute Indian Tribe,* 623 F.2d 670, 23 EPD ¶31,035 [23 FEP CAses 35] (10th cir. 1980).

Date: 5/16/88

Approved: /s/

Clarence Thomas,
Chairman